No. 08-427

Supreme Court, U.S.
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In The Supreme Court of the United States

THOMAS M. HODGSON, Individually and as BRISTOL COUNTY SHERIFF,

Petitioner,

v.

DAVID DAVIGNON, DAVID GOUVEIA, DAVID MILLER, EDWARD MORRIS, JR., and THOMAS PRESBY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner fails to present an issue, based on the trial record, worthy of consideration by this Court.

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STATEMENT OF CASE

Respondents refer to the First Circuit's description of the relevant facts. App., p. 3-11. Notably, the First Circuit found:

> At trial, conversations between plaintiffs and four officers were highlighted. There was no dispute that the conversations were brief, with estimates ranging from approximately 10 to 45 seconds. App., p. 5.
>
> Testimony and investigative reports reveal that when the plaintiffs approached other officers they did so in a civil, non-threatening manner. App., p. 24.
>
> Neither the plaintiffs nor the officers with whom they spoke testified that the conversations distracted any of them from their work, or otherwise endangered staff or inmates. App., p. 6.
>
> Here, Hodgson had strong evidence indicating the plaintiffs' speech was not disruptive. App., p. 21.
>
> [T]he timing of the suspensions is suspect. When Hodgson suspended the five active union members, he had already demonstrated significant frustration with the union, indulging in an outburst during one negotiation session in particular. App., p. 26.
>
> Further, although Hodgson at one point testified that it was a violation to be doing anything other than working in the facility, he later said that officers were permitted to talk

> about non-union related topics such as upcoming parades, sports, and other small talk subjects. App., p. 11.
>
> Additionally, Hodgson's own actions and pattern of enforcement further undermine his claim of legitimate motives. Although asserting that discussion of union matters is particularly divisive and poses a serious risk of disruption, Hodgson used roll call to personally discuss these same union matters. Relatedly, if Hodgson was so concerned that any non-work focused speech would create such serious distractions and risks, we think it *more than curious* that he would allow employees to discuss things such as parades and sports without punishment. App., p. 26 (emphasis added).

In his statement of case, Petitioner ventures far outside the First Circuit's recitation of the found facts and relies instead on his own self-serving testimony at trial. Petitioner's version of the facts was rejected by the jury and the trial judge. In addition, the First Circuit scrutinized the trial record and expressly found no support for Petitioner's view of the case.

The critical facts, adopted by the jury and the trial judge, and cited in the First Circuit's decision, are manifestly different:

> Although expressing valid interests, the defendant has not in our view demonstrated how the plaintiffs' speech here created harm or increased risks. There was no evidence of actual disruption, despite the fact that the

> plaintiffs spoke at work and during work hours. App., p. 23.
>
> In any event, the record is even thinner in support of Hodgson's position that the plaintiffs' speech threatened to disrupt the harmony among workers. App., p. 24.
>
> If the plaintiffs' speech hinted at burgeoning signs of hostility toward officers unsympathetic to the union, Hodgson's concerns about potential disruption to workplace harmony would have substance. After an exhaustive review of the record, however, we find not even the specter of such harm. App., p. 25.
>
> In this case, there is ample evidence that Hodgson suspended the plaintiffs not out of a legitimate concern that their speech compromised safety at the correctional facilities but because of their pro-union activity. App., p. 25-26.
>
> At trial, the plaintiffs discredited the theory that Hodgson acted because the plaintiffs' speech posed the potential for disruption. App., p. 35.

Petitioner also mischaracterizes the trial court's rulings on two requested jury instructions. Petition, p. 7-8.

Petitioner argues that, in declining to give the requested "deference" instruction, "the trial judge stated his belief that the 'deference' rule did not apply to employment decisions." Petition, p. 8. Not so. The trial judge did not state a belief either way. He merely

declined to give the instruction as requested because Petitioner failed to cite precedent holding that deference should be afforded to the *employment* decisions of prison officials, as opposed to decisions affecting inmates. App., p. 33. The First Circuit found no error because of Petitioner's failure to provide legal support for his request. App., p. 33. *See Cambridge Literary Properties, Ltd. v. W. Goebel Porzellanfabrik G.M.B.H. & Co. Kg.*, 295 F.3d 50 (1st Cir. 2002) (where party fails to make reasonable effort to argue claim by not "supplying pertinent authorities or accounting for their lack," issue is not preserved for appeal).

Petitioner also argues that, in declining to give the requested "potential disruption" instruction, the trial judge adopted the view that Petitioner had to prove actual disruption. Petition, p. 8. Again, not so. The trial judge declined to give the requested instruction because the issue was sufficiently addressed in his charge. App., p. 33. The First Circuit ruled that the requested instruction was "correct as a matter of substantive law," but concluded that "this instruction was substantially incorporated into the charge." App., p. 33, quoting *U.S. v. McGill*, 953 F.2d 10, 12 (1st Cir. 1992) ("so long as the charge sufficiently conveys the defendant's theory, it need not parrot the exact language that the defendant proffers").[1]

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[1] The First Circuit also held that, even if the failure to give the instruction was error, the error was harmless. App., p. 34-35. The court wrote:

(Continued on following page)

In any event, as discussed *infra*, the First Circuit properly ruled that the issues of "deference" and "potential disruption" should be determined by the court, and not the jury, as part of the *Pickering* balancing test. App., p. 52-53.

REASONS FOR DENYING WRIT

Petitioner advances two flawed arguments. He argues that the First Circuit's decision conflicts with holdings in the Seventh and Eighth Circuits on the issues of a) "deference" to the employment decisions of law enforcement agencies and b) "potential disruption." Petition, p. 12-16, 18. He also argues that the First Circuit's view of "potential disruption" raises an important public policy concern that "requires a clear ruling by this Court that a public safety official need not await actual disruption before regulating speech in the workplace." Petition, p. 16.

Petitioner's arguments have no merit. The First Circuit's decision does not conflict with holdings in

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Here, even if the district court had specifically used the phrase "potential disruptiveness" in the instruction, it is unlikely that the jury would have reached a different conclusion. At trial, the plaintiffs discredited the theory that Hodgson acted because the plaintiffs' speech posed the potential for disruption. And further, as discussed above, the jury almost certainly considered the potential for disruption given the language of the actual instruction. App., p. 35.

the Seventh and Eighth Circuits, but is entirely consistent with them. In addition, the issue of "potential disruption" has already been settled by this Court. The First Circuit applied correct legal principles to the facts actually found in this case.

I. THE FIRST CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS IN THE SEVENTH AND EIGHTH CIRCUITS ON THE ISSUE OF "DEFERENCE."

Respondents do not quarrel with Petitioner's claims that law enforcement agencies are unique among governmental agencies in the need to maintain order and discipline, Petition, p. 16-17, that law enforcement agencies must "receive greater latitude in disciplining employees than some other public entities, such as universities," Petition, p. 17, and that the employment decisions of law enforcement agencies are entitled to "deference." Petition, p. 12-15. However, Petitioner misstates the record when he says that the First Circuit's decision conflicts with decisions of the Seventh and Eighth Circuits, holding that the employment decisions of law enforcement agencies are entitled to judicial deference. Petition, p. 14-15, citing *Shands v. City of Kennett*, 993 F.2d 1337 (8th Cir. 1993), *Kokkinis v. Ivkovich*, 185 F.3d 840 (7th Cir. 1999), and *Williams v. Seniff*, 342 F.3d 774 (7th Cir. 2003). What Petitioner conspicuously refuses to acknowledge is that the First Circuit explicitly applied these legal principles in its decision.

The First Circuit properly discussed the framework for review of public employee First Amendment claims. First, the court must determine whether the employee spoke as a citizen on matters of public concern; second, the employee's interest as a citizen in commenting upon those matters must be balanced against the employer's interest in the efficient performance of its public service;[2] and third, if the balance weighs in favor of the employee, it must be determined whether the protected speech was a substantial or motivating factor in the employer's disciplinary action. App., p. 13-14.

Here, the trial court ruled that the balance of interests weighed in favor of Respondents. It then submitted the balancing test to the jury. Petition, p. 7. Petitioner argues that the trial court rejected the deference standard by not instructing the jury as follows: "In addition, judicial review of prison officials' actions, especially those taken to preserve institutional security, is very limited. Courts reviewing the administration of prisons and jails must give appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement." Petition, p. 8, 15-16. The First Circuit ruled that the trial judge's refusal to give that specific instruction was proper in light of Petitioner's failure to provide

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[2] This balancing test was set forth by this Court in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), and is commonly referred to as the *Pickering* balancing test.

legal support for his request. Petition, p. 13, citing App., p. 33. In addition, the First Circuit stated:

> The cases Hodgson cites in his reply brief [the same cases cited in the petition here] discuss generally the principle of *judicial* deference to decisions made within a public safety organization. They do not stand for the proposition that a court should instruct a jury regarding this principle. The reason for this is obvious: juries should not be engaging in *Pickering* balancing in the first place. App., p. 53 (emphasis in original).

The balancing test is an issue for the court. Here, the trial court performed the balancing test before submitting it to the jury, concluding that the balance of the competing interests weighed in favor of Respondents. App., p. 14. That determination was reviewed *de novo* on appeal. App., p. 14, citing *Knowlton v. Greenwood Indep. School District*, 957 F.2d 1172, 1177-78 (5th Cir. 1992) (reviewing balancing question *de novo* despite fact that district court sent question to jury). Therefore, the issue is not whether the trial court's refusal to provide the requested instruction was proper, or whether the trial court applied correct legal standards in performing the balancing test. The issue is whether the First Circuit applied correct legal principles in reviewing the trial court's determination *de novo*.

Petitioner argues that the First Circuit followed the trial court in rejecting a deference standard in the context of public employee First Amendment claims.

Petition, p. 16 ("Yet, both the trial court and the First Circuit rejected the deference concepts . . . "). Far from rejecting the deference concept, the First Circuit applied the same deference analysis used by the Seventh and Eighth Circuits. Those Circuits hold that deference applies to judicial review of a law enforcement agency's disciplinary decisions on two levels: a) to the employer's determinations as to the existence of actual or potential disruption caused by employee speech and b) to the employer's disciplinary response itself. *See Shands*, 993 F.2d at 1344-45, and *Kokkinis*, 185 F.3d at 845-46.

First, the First Circuit acknowledged that, in operating correctional facilities, the Petitioner has a greater interest in maintaining discipline and harmony in the workplace:

> In emphasizing the government's interests, both Hodgson and amici raise concerns that are not insubstantial. In addition to contending that the plaintiffs' speech caused actual disruption, Hodgson testified about the more general need to assert control over correctional officers' speech. He spent considerable time detailing the pressurized, high-stakes environment in which the officers work and relating how, in particular, if plaintiffs' speech was left unchecked, it could have potentially disrupted that environment, creating risks to the safety of employees and inmates alike. Maintaining discipline and harmony in the workplace is a valid governmental interest . . . *The need for discipline,*

> *maintenance of harmony among co-workers, and close working relationships requiring personal loyalty and confidence is greater in the context of law enforcement.* Putting aside practical distinctions between correctional facilities and police departments, the importance of safety within correctional facilities cannot casually be dismissed. App., p. 22-23 (emphasis added) (internal citations omitted).

Next, the First Circuit concluded that, even in the face of this greater interest, Petitioner's decisions were not reasonable and not supported by the evidence:

> *Although expressing valid interests*, the defendant has not in our view demonstrated how the plaintiffs' speech here created harm or increased risks. There was no evidence of actual disruption, despite the fact that the plaintiffs spoke at work and during work hours. App., p. 23 (emphasis added).
>
> In any event, the record is even thinner in support of Hodgson's position that the plaintiffs' speech threatened to disrupt the harmony among workers. App., p. 24.
>
> If the plaintiffs' speech hinted at burgeoning signs of hostility toward officers unsympathetic to the union, Hodgson's concerns about potential disruption to workplace harmony would have substance. After an exhaustive review of the record, however, we find not even the specter of such harm. App., p. 25.

> In this case, there is ample evidence that Hodgson suspended the plaintiffs not out of a legitimate concern that their speech compromised safety at the correctional facilities but because of their pro-union activity. App., p. 25-26.

There can be no question that the First Circuit recognized, identified, and applied correct legal principles to its *de novo* analysis of the *Pickering* balancing test. Petitioner's difficulty is that his facts do not support his law.

Petitioner claims that the First Circuit had not addressed the issue before and treated the issue as a matter of first impression. Petition, p. 13. This case was *not* one of first impression. In its prior decisions, the First Circuit had recognized and applied a deference based standard for law enforcement agencies. App., p. 23, citing *Guilloty Perez v. Pierluisi*, 339 F.3d 43, 53-54 (1st Cir. 2003) ("The importance of discipline, maintenance of harmony among co-workers, and close working relationships requiring personal loyalty and confidence is greater in the context of a law enforcement agency . . . than it might be in another type of government agency. Therefore, *courts must be sensitive to the needs of law enforcement agencies in disciplining an employee whose expressive conduct interferes with these interests.*") (emphasis added) (internal citations omitted). *See also Jordan v. Carter*, 428 F.3d 67, 74 (1st Cir. 2005) ("in examining [employer's] side of the balance, we acknowledge that the government's interest is particularly acute in the

context of law enforcement, where there is a heightened interest in maintaining discipline and harmony among employees") (internal quote omitted), citing *inter alia* the Seventh Circuit's decision in *Kokkinis*, 185 F.3d at 845.

II. THE FIRST CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS IN THE SEVENTH AND EIGHTH CIRCUITS ON THE ISSUE OF "POTENTIAL DISRUPTION."

Petitioner makes essentially the same argument on the "potential disruption" issue. Petitioner argues that a public employer may regulate employee speech not only when it causes *actual disruption* in the workplace, but also when it has the *potential for disruption*. Petition, p. 16-19. Petitioner states that the trial court rejected the "potential disruption" principle by not instructing the jury as follows: "Even absent the special deference given to prison administrators, potential disruptiveness can outweigh the employee's free speech interests." Petition, p. 8, 18. The First Circuit found no error because "this instruction was substantially incorporated into the charge to the jury." App., p. 33. In addition, the First Circuit noted that the issue of potential disruption is addressed in the context of the *Pickering* balancing test, and "juries should not be engaging in *Pickering* balancing in the first place." App., p. 53. The issue is for the court, and the First Circuit reviewed it *de novo* on appeal. App., p. 24-25. Therefore, the

question is whether the First Circuit applied correct legal principles when performing the balancing *de novo*.

Petitioner argues that the First Circuit, "while not rejecting these substantive principles outright," in effect adopted a standard different than "potential disruption," which a) conflicts with decisions of the Seventh and Eighth Circuits, and b) "fails to recognize the important policy considerations associated with workplace speech and behavior within the confines of a prison." Petition, p. 18. Contrary to Petitioner's claim that the First Circuit *in effect* adopted the wrong standard, the First Circuit's decision is specific on this subject:

> Against the scant evidence of actual disruption, Hodgson *reasonably asserts* that a government employer is entitled to consider not only whether the employee's speech actually disrupted the work place environment but also *whether the speech had the potential to disrupt*. He argues that the plaintiffs' speech threatened to "disintegrate" working relationships by creating a division between officers sympathetic to the union and those who were not. *Indeed, an employer may consider a speech's potential to disrupt. See Connick*, 461 U.S. at 152 ("We do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action"). App., p. 24 (emphasis added).

It is utterly frivolous for Petitioner to argue that the First Circuit required "actual disruption," when the decision clearly states that "an employer may consider a speech's potential to disrupt." App., p. 24. Applying this principle to the trial record, the First Circuit concluded *de novo*:

> [T]he record is even thinner in support of Hodgson's position that the plaintiffs' speech threatened to disrupt the harmony among workers . . . If the plaintiffs' speech hinted at burgeoning signs of hostility toward officers unsympathetic to the union, Hodgson's concerns about potential disruption to workplace harmony would have substance. After an exhaustive review of the record, however, *we find not even the specter of such harm*. The *mere incantation* of the phrase "internal harmony in the workplace" is not enough to carry the day. App., p. 24-25 (emphasis added) (internal quotes and citations omitted).

Petitioner's "incantation" is not supported by the trial record. There is no merit to Petitioner's argument that the First Circuit's standard was either incorrect or in conflict with the Seventh and Eighth Circuits.

Petitioner finally claims that "public policy requires a clear ruling by this Court" that public safety employers are allowed to regulate employee speech based on its potential to cause disruption, without having to wait for "the potentially disastrous consequences of actual disruption." Petition, p. 11, 16-17. That issue, however, has long been conclusively

decided by this Court. *See Connick v. Myers*, 461 U.S. 138, 152 (1983) ("We do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action"). *See also Waters v. Churchill*, 511 U.S. 661, 662 (1994) ("as a matter of law, the potential disruptiveness of [employee's] speech would have rendered it unprotected under the *Connick* test"). The First Circuit expressly referred to these principles, even quoting this Court's language from *Connick* and *Waters*. App., p. 19-20, 24. The First Circuit's decision accords with this Court's established views on "potential disruption."

Petitioner continues to assert unfounded and rejected facts to obtain further judicial review of his wrongful conduct. The trial record simply does not support his arguments.

CONCLUSION

The petition for writ of certiorari should be denied. Respondents request attorney's fees and costs on appeal in connection with their claim under 42 U.S.C. sec. 1983. Respondents also request attorney's fees and costs, including double costs, for Petitioner's filing of a frivolous petition under Supreme Court Rules 42(2) and 43(7).

Respectfully submitted,

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